

THE HONORABLE JOHN C. COUGHENOUR

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RINKY DINK, INC. d/b/a PET STOP, a
Washington corporation; and FRANK KNOTT,
a Washington resident, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

ELECTRONIC MERCHANT SYSTEMS,
INC. d/b/a ACCEPT CREDIT CARD
SERVICES, a Delaware corporation; JEFFREY
GEHRS, a Virginia resident; and CALLFIRE,
INC., a California corporation,

Defendants.

NO. 2:13-cv-01347-JCC

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
AMENDMENT OF ORDER AND
FED. R. CIV. P. 54(b)
CERTIFICATION**

I. INTRODUCTION

Plaintiffs Rinky Dink, Inc. and Frank Knott respectfully renew their request that this Court amend its February 25, 2015 Order Sealing Documents and Granting Defendant CallFire's Motion for Summary Judgment (Dkt. No. 113) ("Order") to include specific findings that the Order is a final judgment with respect to CallFire, Inc., pursuant to Fed. R. Civ. P. 54(b).¹ As Plaintiffs' Motion for Amendment of Order and Fed. R. Civ. P. 54(b) Certification

¹ The Order addresses both Plaintiffs' claims under the TCPA and under the WADAD. Plaintiffs seek certification of the Order as a whole, rather than limited to claims under the TCPA.

1 explains, the Order is a final judgment with respect to Plaintiffs' claims against CallFire, the
 2 Order involves claims that are factually and legally distinct from Plaintiffs' remaining claims
 3 against Defendants Electronic Merchant Systems ("EMS") and Jeffrey Gehrs, and there is no
 4 just reason for delay.

5 The Order addressed three issues: (1) whether CallFire is a common carrier subject to
 6 liability under the TCPA, (2) whether CallFire initiated calls to Plaintiffs under the TCPA and
 7 (3) whether CallFire initiated calls to Plaintiffs under the WADAD. Consequently, the issues
 8 Plaintiff seeks to have certified present purely legal questions that are wholly distinct and
 9 separable from their remaining claims against EMS and Jeffrey Gehrs.

10 II. ARGUMENT

11 Defendant CallFire's argument that the Order cannot be certified under Rule 54(b)
 12 because Plaintiffs' "claims are lodged equally against EMS, Gehrs, and CallFire" misses the
 13 mark. *See* Dkt. No. 119 at 2. CallFire argues that Plaintiffs' claims against CallFire are
 14 identical to their claims against EMS and Gehrs and that there is no way to "unscramble" them.
 15 *Id.* at 3–4. While it is true that Plaintiffs believe that all three Defendants in this action violated
 16 the TCPA and the WADAD, the factual predicates for each Defendant's liability are separate
 17 and distinct. Moreover, the legal issues that Plaintiffs seek to resolve on appeal are entirely
 18 distinct from any of the legal issues that remain before this Court.

19 The Court's February 24 Order focuses on whether CallFire is liable under the TCPA
 20 and WADAD. CallFire's liability hinges on whether or not CallFire has in fact established
 21 itself as a common carrier, whether its potential status as a common carrier absolves CallFire
 22 from liability, and whether CallFire initiated calls under the WADAD and TCPA. These are
 23 discrete legal issues that are entirely separate and distinct from whether EMS and Jeffrey Gehrs
 24 are liable to Plaintiffs.

25 The Ninth Circuit has squarely endorsed Plaintiffs' position and affirmed Rule 54(b)
 26 certification of a summary judgment order in an analogous case. In *Noel v. Hall*, the district
 27

1 court certified for appeal a summary judgment order dismissing wiretapping claims against one
 2 of a number of defendants. 568 F.3d 743 (9th Cir. 2009). The district court found that the
 3 summary judgment order was a final judgment with respect to defendant Weisser because it
 4 disposed of the case against him. *Id.* at 747. The court further found that there was no just
 5 reason for delay. *Id.* This decision was affirmed by the Ninth Circuit, which determined that
 6 “even though similar claims remain pending against other defendants, the factual bases of many
 7 of the claims differ as to each defendant.” *Id.* The precise situation in *Noel* is also presented
 8 here: the factual bases for Plaintiffs’ claims differ against each Defendant, supporting
 9 certification for immediate review under Rule 54(b).

10 Contrary to CallFire’s argument, certification of this Order does not present the danger
 11 of piecemeal appeals. The Order involves discrete legal issues regarding CallFire’s liability to
 12 Plaintiffs that rely on unique facts that are not shared by the other Defendants. There is no
 13 danger that these issues will need to be revisited by this Court.

14 Finally, there is no just reason to delay review of the Order. Whether or not the Court
 15 properly dismissed the claims against CallFire is in no way dependent on the remaining
 16 proceedings. Further, swift resolution of this appeal will result in a more expedient disposition
 17 of the claims against CallFire. *See Noel*, 568 F.3d at 747 (finding no reason for delay when
 18 issue on appeal had potential to “end [one defendant’s] journey through federal courts”).

19 III. CONCLUSION

20 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their
 21 Motion for Amendment of Order and CR 54(b) Certification.
 22
 23
 24
 25
 26
 27

1 RESPECTFULLY SUBMITTED AND DATED this 20th day of March, 2015.

2 TERRELL MARSHALL DAUDT & WILLIE PLLC

3
4 By: /s/ Beth E. Terrell, WSBA #26759

5 Beth E. Terrell, WSBA #26759

6 Email: bterrell@tmdwlaw.com

7 Adrienne D. McEntee, WSBA #34061

8 Email: amcentee@tmdwlaw.com

9 936 North 34th Street, Suite 300

10 Seattle, Washington 98103-8869

11 Telephone: (206) 816-6603

12 Facsimile: (206) 350-3528

13 Rob Williamson, WSBA #11387

14 Email: rob@williamslaw.com

15 Kim Williams, WSBA #9077

16 Email: kim@williamslaw.com

17 WILLIAMSON & WILLIAMS

18 2239 West Viewmont Way West

19 Seattle, Washington 98199

20 Telephone: (206) 294-3085

21 *Attorneys for Plaintiffs and the Proposed Classes*

CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on March 20, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael K. Vaska, WSBA #15438
Email: vaskm@foster.com
Benjamin S. Halasz, WSBA No. 38437
Email: halab@foster.com
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700

William F. Krebs, *Admitted Pro Hac Vice*
Email: wkrebs@beankinney.com
Rachelle E. Hill, *Admitted Pro Hac Vice*
Email: rhill@beankinney.com
BEAN, KINNEY & KORMAN, P.C.
2300 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
Telephone: (703) 525-4000
Facsimile: (703) 525-2207

Attorneys for Defendants Electronic Merchant Systems and Jeffrey Gehrs

Duncan C. Turner, WSBA # 20597
Email: duncanturner@badgley-mullins.com
BADGLEY MULLINS TURNER, PLLC
19929 Ballinger Way NE, Suite 200
Shoreline, Washington 98155
Telephone: (206) 621-6566
Facsimile: (206) 621-9686

1 Michael B. Hazzard, *Admitted Pro Hac Vice*
Email: Michael.hazzard@arentfox.com
2 Adam D. Bowser, *Admitted Pro Hac Vice*
Email: adam.bowser@arentfox.com
3 ARENT FOX LLP
1717 K Street, NW
4 Washington, DC 20006-5344
Telephone: (202) 857-6126
5 Facsimile: (202) 857-6395

6 *Attorneys for Defendant CallFire, Inc.*

7
8 DATED this 20th day of March, 2015.

9 TERRELL MARSHALL DAUDT & WILLIE PLLC

10 By: /s/ Beth E. Terrell, WSBA #26759
Beth E. Terrell, WSBA #26759
11 Email: bterrell@tmdwlaw.com
936 North 34th Street, Suite 300
12 Seattle, Washington 98103
Telephone: (206) 816-6603
13 Facsimile: (206) 350-3528

14 *Attorney for Plaintiffs and Proposed Classes*